89-405

NO. _____



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

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MOKI MAC RIVER EXPEDITIONS, INC.
*Petitioner,*

v.

ARIZONA DEPARTMENT OF REVENUE,
*Respondent.*

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**On Petition for a Writ of Certiorari to the Arizona Court of Appeals**

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## PETITION FOR A WRIT OF CERTIORARI

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66 pgs

## QUESTIONS PRESENTED

I. Is Arizona's transaction privilege tax statute, which imposes an unapportioned tax on gross receipts for services contracted and paid for in Utah but delivered in Arizona by a Utah corporation engaged in interstate commerce, unconstitutional as an undue burden on interstate commerce?

II. Does a Utah corporation whose sole contact with the State of Arizona is the delivery within federal enclaves located in Arizona of services contracted and paid for in Utah have sufficient nexus with Arizona to support imposition of a transaction privilege tax?

III. Is a transaction privilege tax on the gross proceeds of sales of a service which is contracted and paid for in Utah, but delivered exclusively within the confines of federal enclaves located within Arizona, reasonably related to the services and benefits provided by the state to the foreign taxpayer?

## PARTIES TO THE PROCEEDINGS

Petitioner Moki Mac River Expeditions, Inc. ("Moki Mac") is a Utah corporation, licensed to do business and doing business in Utah. Moki Mac appeared as a taxpayer before the Arizona Department of Revenue, as appellant before the Arizona State Board of Tax Appeals, as defendant in the Superior Court of Arizona, Maricopa County, as appellee before the Arizona Court of Appeals and as petitioner for review before the Arizona Supreme Court.

Respondent Arizona Department of Revenue is an agency of the State of Arizona charged with assessing and collecting taxes on behalf of the state.

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## PETITION FOR A WRIT OF CERTIORARI

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Petitioner Moki Mac River Expeditions, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Arizona Court of Appeals entered in this action on January 24, 1989.

## OPINIONS BELOW

The opinion of the Arizona Court of Appeals appears in Appendix A hereto and is reported at 773 P.2d 474 (Ariz. Ct. App. 1989). It has not yet appeared in the official reporter. The judgment of the Superior Court of Arizona and the opinion of the Arizona Board of Tax Appeals, which are not reported, are included as Appendices B and C, respectively.

## JURISDICTION

This court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a). The judgment of the Arizona Court of Appeals was entered on January 24, 1989. A timely Petition for Review submitted to the Arizona Supreme Court was denied on June 13, 1989. A timely Motion for Procedural Order Granting Leave to File Motion to Reconsider was denied by the Arizona Supreme Court on July 3, 1989. This petition was filed within 90 days of the disposition of the Petition for Review.

## PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The commerce clause of the United States Constitution, article I, section 8, clause 3, provides in pertinent part that "The Congress shall have Power . . . To regulate commerce . . . among the several States . . . ."

The relevant Arizona statutes are set out in Appendix E. These statutes include Ariz. Rev. Stat. §§ 42-1302, 42-1306 through 42-1309, 42-1310.12, 42-1310.14 and 42-1313 (Supp. 1988).

## STATEMENT OF THE CASE

### I. Statement of Facts

Moki Mac River Expeditions, Inc. ("Moki Mac") is a Utah corporation with its sole office in Salt Lake City, Utah. Moki Mac provides river rafting adventures in several western states to customers from throughout the United States and around the world. One such trip traverses the Colorado River through Glen Canyon National Recreation Area and Grand Canyon National Park in Arizona. Moki Mac advertises its services in trade magazines, but most customers are referred by word of mouth. Moki Mac's Salt Lake City office handles all its business transactions, including customer reservations, ticket sales, and payments.

Moki Mac is not registered to do business in Arizona, nor has the State of Arizona contended that it must be so registered. Moki Mac maintains no offices or solicitors in Arizona. Its contact with Arizona is limited to the delivery within Arizona's borders of services that were contracted for in Utah. It leases its rafts and other equipment from a Utah lessor. Moki Mac pays a variety of taxes in Utah, including Utah corporate income tax and Utah sales tax on food it purchases in Utah for use on the river trips. Moki Mac makes Utah worker's compensation payments and withholds Utah personal income taxes from its employees' wages.

The vast majority of Moki Mac's contacts with Arizona occur within federal parks and recreation areas. At all times relevant to this petition Moki Mac greeted its customers at Lee's Ferry in the Glen Canyon National Recreational Area and transported them down the Colorado River, through the Grand Canyon National Park to Diamond Creek. Moki Mac paid the National Parks Service a franchise fee for the use of the park areas. This

fee was in an amount equal to 2.5% of Moki Mac's gross receipts on river trips through the Grand Canyon.

Moki Mac provided no surface transportation. Its clients provided their own transportation to and from the rafting sites. Moki Mac did, however, refer its clients to persons or companies who would provide transportation or shuttle their cars.

Moki Mac leases, from a Utah lessor, two acres outside the national parks in Arizona. That two-acre property at Badger Creek contains a storage building, a storage shed, a temporary and a permanent dwelling, and parking areas. Moki Mac's owners, and occasionally its employees, live in the dwellings between trips. They leave personal property there for up to six months during the rafting season, and store river trip supplies in the storage facilities. Moki Mac also uses its leased facilities as a staging area for river trips; its employees pack food, load rafts, and clean up after trips on this leased property. Moki Mac buys some perishable supplies for its trips in Page, Arizona.

## II. Proceedings Below

The Arizona Department of Revenue assesses and collects transaction privilege taxes pursuant to Ariz. Rev. Stat. §§ 42-1301 through 42-1345. The Department audited Moki Mac in 1983 for the years 1980-82 and issued a deficiency assessment for taxes it contended were due under the transaction privilege tax on businesses charging admission fees for amusement, under Ariz. Rev. Stat. § 42-1314. The statute has subsequently been amended and renumbered. It is presently codified in substantially the same form at Ariz. Rev. Stat. § 42-1309(A)(1) (Supp. 1988). See text of statutes at Appendix E. The amendments are irrelevant to the issues raised in this action.

Moki Mac protested the assessment in full. The

Department hearing officer's proposed decision granted the protest because the nexus between Moki Mac's activities and the state of Arizona was insufficient to support imposition of the tax. See Appendix D. Despite this proposed decision, the Director of the Department of Revenue upheld the assessment. Moki Mac appealed the Director's decision to the Arizona State Board of Tax Appeals, which abated the tax because Moki Mac lacked sufficient nexus with Arizona for the state to assess the tax. See Appendix C. The Department then appealed to the Superior Court of Arizona, Maricopa County. On cross-motions for summary judgment the Superior Court entered judgment in Moki Mac's favor because of the lack of nexus with the taxing state. See Appendix B.

The Department appealed that decision to the Arizona Court of Appeals, which reversed the trial court. See Appendix B. After deciding that Moki Mac had sufficient contacts with the taxing state to support imposition of the tax, the Court of Appeals reviewed the applicable tax statutes to determine whether they violated the Commerce Clause of the United States Constitution. The court purportedly applied the four-part test established in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), and concluded that Arizona could constitutionally tax the gross proceeds of Moki Mac's Colorado River rafting expeditions without apportionment. See Appendix B.

Moki Mac subsequently sought review in the Arizona Supreme Court through a petition for review. The petition was denied. Moki Mac then sought leave to file a motion for reconsideration based on this Court's recent decision in *Goldberg v. Sweet*, 109 S.Ct. 582 (1989). That motion was also denied and Moki Mac now seeks relief from this Court by petition for certiorari.

## REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. The Arizona Court's Decision, Which Directly Contradicts This Court's Holdings in *Complete Auto Transit, Inc. v. Brady* and *Goldberg v. Sweet*, Will Have a Substantial and Unconstitutional Impact on an Indeterminably Large Number of Persons Who Are Engaged in Interstate Commerce.

Arizona's transaction privilege taxes affect not only those persons engaged in interstate commerce in the business of charging admission fees for amusements, the category in which the state has classified Moki Mac, but also those engaging in the transportation, communications, utilities, publishing, printing, contracting, and mining businesses, among others. Ariz. Rev. Stat. §§ 42-1307 through 42-1309, 42-1310.12, 42-1310.14, and 42-1313; Appendix E. Businesses in each of these categories which operate in both Arizona and other states are now subject to an unapportioned gross receipts tax.

In its decision below, the Arizona Court of Appeals grossly misstated the test established by this Court to determine whether a tax on interstate commerce is fairly apportioned. For whatever reason, the Arizona Supreme Court has refused to review the decision notwithstanding this Court's recent decision in *Goldberg v. Sweet*. As a result, Moki Mac and many other similarly situated businesses are now subject to an unapportioned tax which is clearly an unconstitutional restriction on interstate commerce.

The scope of the activities which will be affected by the Arizona Court's decision is indeterminably broad. It is clear, however, that virtually any entity engaged in interstate commerce which has any contact with the State of Arizona may now be subjected to these unapportioned

taxes on gross income.[1]

The issue whether this tax is fairly apportioned is certain to arise again and again as the State of Arizona expands the scope of its taxes in reliance upon the decision below. Arizona's courts are now bound by a decision which, in direct contravention of the tests established in *Complete Auto* and *Goldberg* states that "[n]o apportionment is required" until actual multiple taxation can be proven. *Department of Revenue v. Moki Mac River Expeditions, Inc.*, ___ Ariz. ___, 773 P.2d 474, 481 (Ct. App. 1989); Appendix A at 14.

The issue whether an entity engaged in interstate commerce, whose sole or substantially only contact with a taxing state occurs on federal land, has sufficient nexus with the state to support a transaction privilege tax will recur. At least 60% of the land in Arizona is owned or controlled in some manner by agencies of the federal government, including the Forest Service, the Bureau of Land Management, and the Bureau of Indian Affairs. Valley National Bank, *Arizona Statistical Review* (1988). There are many businesses engaged in interstate commerce whose sole contact with the State of Arizona occurs on federal land or on federally controlled land. Examples of which Moki Mac is aware include other Utah river rafting concessionaires and foreign contractors performing construction contracts for the federal government on federal enclaves located within Arizona. This Court has

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[1] Indeed, there are currently pending in the State of Arizona at least two other closely related tax disputes which have been stayed pending resolution of this action:

1. *Arizona Department of Revenue v. Roy D. Garren Corporation*, Arizona State Board of Tax Appeals, Docket No. 605-88-S.

2. *Grand Canyon Expeditions, Inc. v. Arizona Department of Revenue*, Arizona State Board of Tax Appeals, Docket No. 652-89-S.

never directly addressed the issue whether performance of a service on federal land, under a federal license or contract, creates a sufficient nexus for state taxation.

The decisions of this Court on constitutional questions are binding on state courts. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). The Arizona court cannot simply ignore the decisions of this Court and apply to a constitutional question whatever analysis it desires. This Court should grant review to correct the Arizona court's refusal to apply the appropriate tests and to follow the applicable precedents that must guide its decision.

The Court should grant review not only to correct the plain error of the court below, but also to protect the rights of other taxpayers who, like Moki Mac, may be subject to completely unapportioned gross receipts taxes in more than one jurisdiction. Further, the Court should grant review to resolve the nexus and fair relationship issues raised below.

## II. Arizona's Transaction Privilege Tax Statutes Are Facially Unconstitutional and Unconstitutional As Applied to Moki Mac Because They Operate as an Impermissible Restraint on Interstate Commerce.

The State of Arizona has enacted a transaction privilege taxing scheme under Ariz. Rev. Stat. §§ 42-1301 through 42-1345. Arizona has imposed a transaction privilege tax on Moki Mac under Ariz. Rev. Stat. § 42-1309 (formerly Ariz. Rev. Stat. § 42-1314). Under this statute the state levies a tax on the gross receipts of "every person engaging or continuing in this state . . . any business charging admission fees for . . . amusement . . . ." *Id.* Moki Mac contends the Arizona statute offends the Commerce Clause of the United States Constitution. U.S. Const. art. I, § 8, cl. 3.

When a tax is challenged as offensive to the commerce clause of the Constitution its validity is tested by a four-part test established in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). A tax on an entity engaged in interstate commerce is a legitimate exercise of state power only if [1] the taxed activity has a sufficient nexus with the state; [2] the tax does not discriminate against interstate commerce; [3] the tax is fairly apportioned; and [4] the tax is related to services provided by the state. *Id.* at 277-78. If a state tax fails even one part of the test it is unconstitutional. *See, e.g., Armco Inc. v. Hardesty*, 467 U.S. 638 (1984).

In the proceedings below Moki Mac challenged the Arizona taxing scheme under three of the four prongs of the *Complete Auto* test. Moki Mac argued that the tax is not fairly apportioned, that Moki Mac lacks sufficient nexus with the State of Arizona to support imposition of the law, and that the tax is not related to services provided by the state. The Arizona Court of Appeals rejected these contentions as a matter of law. *Moki Mac*, 773 P.2d at 480-81; Appendix A at 9-14.

The Arizona court's analysis of the fair apportionment requirement is expressly contrary to the analysis mandated by this Court in *Goldberg v. Sweet*, 109 S.Ct. 582 (1989). Its analysis of the first and fourth prongs of the *Complete Auto* test – though not so blatantly contrary to this Court's decisions as was the fair apportionment analysis – is also erroneous.

A. Arizona's transaction privilege tax statutes are facially unconstitutional because they fail the Internal Consistency and Fair Apportionment Tests established by this court in *Goldberg v. Sweet* and *Complete Auto Transit, Inc. v. Brady*.

In order to satisfy the fair apportionment requirement of *Complete Auto*, a tax statute must pass both the internal consistency test and the external consistency test. *Goldberg v. Sweet*, 109 S. Ct. 582, 588 (1989); *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 169, *reh'g denied*, 464 U.S. 909 (1983). A tax is internally consistent if it is structured so that if every state imposed an identical tax, no multiple taxation would result. *Goldberg*, 109 S. Ct. at 589. The internal consistency test thus mandates application of a hypothetical situation in which every state has passed a statute identical to the challenged tax statute. A tax passes the internal consistency test only if no multiple taxation would result in the hypothetical scenario. *Id.*

The second component of fair apportionment analysis, the external consistency test, analyzes risks of multiple taxation created by actual statutes in other states. The external consistency test asks whether the revenues on which the tax is imposed reasonably reflect the business's in-state activity. *Id.* External consistency often is achieved by some apportionment formula, though it also may be satisfied if a gross receipts tax contains a credit provision so that the taxpayer is not at risk for actual multiple taxation. *Id.* at 590.

A gross receipts tax on a business engaged in interstate commerce is inherently suspect because of the danger of multiple taxation. *General Motors Corp. v. Washington*, 377 U.S. 436, (1964). States can, and have, provided for tax credits that may help to alleviate or

eliminate multiple taxation by providing a credit for taxes paid on the same activity in another jurisdiction. *Goldberg v. Sweet*, 109 S. Ct. at 590. The Arizona tax on gross receipts, however, is unapportioned and provides for no credit to offset payments made to another taxing authority. *See generally* Appendix E.

The Arizona Court of Appeals decision completely ignored the internal consistency test. Instead, the court stated that "[Moki Mac] has not shown that multiple taxation exists, only the possibility that it might exist in the future." *Department of Revenue v. Moki Mac River Expeditions, Inc.*, ___ Ariz. ___, 773 P.2d 474, 481 (Ct. App. 1989); Appendix A at 13. The court thus ignored the requirement that it hypothesize a scenario in which Utah enacted a tax statute identical to that enacted in Arizona and then determine whether Moki Mac would be subject to a multiple tax burden. *Goldberg*, 109 S. Ct. at 589. The Arizona court examined only actual "multiple burdens" and thus applied only the external consistency test. Appendix A at 13. Indeed, the Arizona court dispensed with the fair apportionment requirement entirely by stating that "*[n]o apportionment is required* now because multiple taxation has not been shown to exist." Appendix A at 14 (emphasis added). This analysis is in direct conflict with the analysis mandated by this Court in *Goldberg v. Sweet*. The Goldberg analysis requires not only that the tax be fairly apportioned but that the reviewing court determine fair apportionment by applying first the internal consistency test and then the external consistency test. *Goldberg v. Sweet*, 109 S. Ct. 582, 588-90 (1989).

Arizona's challenged tax statute cannot survive the internal consistency test. The tax is imposed without apportionment upon "the gross proceeds of sales or gross income from the business of every person engaging or continuing in this state . . . any business charging admission fees for . . . amusement . . . ." Ariz. Rev. Stat. §

42-1309(A); Appendix E. There is no dispute that Moki Mac is engaging or continuing in the state of Utah a business charging admission fees for its river rafting expeditions. Indeed, the tickets for these expeditions are sold exclusively in Utah. If Utah enacted a statute identical to Ariz. Rev. Stat. § 42-1309(A)(1) it would impose, without apportionment, a tax on Moki Mac's gross proceeds of ticket sales identical to that imposed by the State of Arizona. Moki Mac would be subjected to an impermissible multiple taxation. Therefore, this tax fails the internal consistency test, fails the fair apportionment test, and is unconstitutional.

The Arizona Court of Appeals' decision was announced on January 24, 1989, just 14 days after this Court's opinion in *Goldberg v. Sweet*. On February 23, 1989, Moki Mac filed a timely Petition for Review with the Arizona Supreme Court. Because this Court's decision had been rendered so soon before the petition was filed, Moki Mac's counsel did not learn of the *Goldberg* decision before filing the Petition for Review. The Arizona Supreme Court declined to review the decision. On June 29, 1989, Moki Mac filed a timely Motion to Reconsider citing this Court's opinion in *Goldberg* as controlling precedent. The Arizona Supreme Court refused to entertain the motion.

B. Arizona's transaction privilege tax is unconstitutional as applied to Moki Mac because Moki Mac's business activity does not have a sufficient nexus with the state and because the tax is not related to services provided by the state.

The challenged tax statutes are unconstitutional as applied to Moki Mac because they fail the first and fourth prongs of the *Complete Auto* test. The first and fourth

prongs of the *Complete Auto* analysis are closely related. *Commonwealth Edison Co. v. Montana*, 453, U.S. 609, 625-26 (1981). The first prong requires that the interstate business have a substantial nexus with a state before the state may impose any tax. *Id.* at 626. The fourth prong of the *Complete Auto* test mandates that the tax's measure be reasonably related to the extent of the taxpayer's contact with the state, thus ensuring that the taxpayer bears only its proper share of the state tax burden. *Commonwealth Edison*, 435 U.S. at 626.

Moki Mac's business activities within the State of Arizona during all times relevant to this petition were insufficient to satisfy the nexus requirement of *Complete Auto*. Moki Mac is a Utah corporation with its offices located in Salt Lake City, Utah. Its administrative, advertising and sales activities occur solely in Utah. It pays a wide range of Utah taxes. Moki Mac has no salesmen or solicitors in Arizona. Aside from advertisements in trade journals of general circulation, it does not advertise in Arizona. It sells no tickets in Arizona. Its only contact with Arizona was the delivery of its river rafting guide service which was contracted and paid for in Utah. Nevertheless, the Arizona court concluded that Moki Mac's activities in Arizona established the necessary constitutional nexus, and were "real and substantial." *Moki Mac*, 773 P.2d at 480; Appendix A at 10-11.

The Arizona court reached its conclusion because Moki Mac's river trips occur in Arizona, its employees sometimes stay in Arizona between rafting trips, and Moki Mac stores equipment and supplies on leased property in Arizona. Appendix A at 11.

At all times relevant to this petition Moki Mac's river trips took place entirely within federal enclaves located within Arizona. Moki Mac paid franchise fees to the federal government for the use of these federal areas. These franchise fees are based on the gross receipts from

Moki Mac's Colorado River rafting expedition ticket sales. They are essentially an admission fee paid to the Park Service. Though nominally located within the boundaries of the state, Moki Mac's activity in Arizona has no real or substantial nexus with the state at all. Accordingly, this tax fails the nexus requirement of the *Complete Auto* test. Additionally, this tax fails the reasonable relationship test of *Complete Auto*. "The commerce clause tips against the tax only when it unfairly burdens commerce by exacting more than a just share from the interstate activity." *Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 748 (1978). Moki Mac argued below that it does not receive benefits from the state which were fairly related to the assessed tax. The Arizona court concluded, however, that the tax assessed on Moki Mac was fairly related to services provided by the State.

In support of its conclusion the court stated that Moki Mac enjoyed police protection, that Moki Mac's customers and employees traveled over Arizona's roads, and that Moki Mac may receive state services connected with its two-acre leasehold during the six months of each year when its employees are in Arizona. Moki Mac is either already paying for these services or receives such limited benefit that the tax bears no relation to the service provided.

The Coconino County Sheriff's Office has entered into a cooperative law enforcement agreement by the terms of which both the County and the National Park Service have jurisdiction to enforce laws within the park. Moki Mac already pays a direct fee to the National Park Service for the right to travel down the Colorado River. While Moki Mac provided no land transportation services whatever, Moki Mac's customers and employees, like all travelers on Arizona roads, paid Arizona's state gasoline tax to defray the cost of building and maintaining

Arizona roads. Further, the owner of the leasehold pays property taxes to the state to defray the cost of the benefits received in connection with the leasehold.

A taxpayer should be required to pay only a "just share of the state tax burden." *Commonwealth Edison,* 453 U.S. at 626. The benefits that Moki Mac purportedly receives from Arizona bear no relation to the tax it is now required to pay. The benefits received certainly do not justify imposing on Moki Mac a tax of more than $13,000 a year, as the State of Arizona has done.

## CONCLUSION

This Court should grant review to correct the Arizona court's error and to prevent the State of Arizona from continuing to impose its unconstitutional tax burdens upon Moki Mac and other similarly situated businesses. The Arizona courts are simply disregarding this Court's holdings in *Complete Auto* and *Goldberg*. This Court should grant review to eliminate any confusion and to compel the state to comply with this Court's decisions.

For all of the foregoing reasons, this Court should grant Moki Mac's petition for a writ of certiorari.

Respectfully submitted,

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## Certificate of Service

The undersigned counsel of record for Petitioner certifies that he is a member of the Bar of this Court and that, on September 7, 1989, three copies of the Petition for a Writ of Certiorari were served upon counsel for Respondent by first-class mail, postage prepaid in Phoenix, Arizona, addressed as follows:

J. Scott Halverson
Assistant Attorney General
1275 West Washington
Phoenix, Arizona 85007

_____

Curtis A. Jennings

# APPENDICES

# APPENDIX A

COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

| | |
|---|---|
| DEPARTMENT OF REVENUE, | ) |
| | ) |
| Plaintiff-Appellant, | ) |
| | ) |
| v. | ) |
| | ) |
| MOKI MAC RIVER EXPEDITIONS, INC., | ) |
| | ) |
| Defendant-Appellee. | ) |
| | ) |
| | ) |

## OPINION

CORCORAN, JUDGE

This appeal involves an attempt by the Arizona Department of Revenue to impose a transaction privilege tax on Moki Mac River Expeditions, Inc. The Department appeals from a summary judgment ruling holding the tax invalid.

### 1. *Facts and Procedural History*

Moki Mac is a Utah corporation with an office and principal place of business in Salt Lake City, Utah. Moki Mac is engaged in the business of providing river rafting adventures in various western states. Among the various trips is one on the Colorado River through Grand Canyon National Park in Arizona.

Moki Mac's customers make reservations through the Salt Lake City office. All payments are received in Salt Lake City. No reservations are made nor money accepted in Arizona. Moki Mac maintains no offices, agents or solicitors in Arizona. Moki Mac is neither registered with

the Arizona Corporation Commission as a foreign corporation doing business in Arizona nor as a passenger carrier, and no contention is made that such registration is required.

Moki Mac's primary contact with Arizona is its delivery of the services contracted for in Utah. All but a very small portion of these services are delivered within the confines of parks and recreational areas belonging to the federal government. Moki Mac greets its customers at Lee's Ferry, located in the Glen Canyon National Recreational Area, and transports them down the Colorado River through Grand Canyon National Park to Diamond Creek, Arizona. Moki Mac pays fees to the National Park Service (NPS) for use of park areas. During all times that its employees and customers are in the park areas, they receive the services provided by the NPS to users of the parks. Although most of these services may be provided exclusively by the NPS, certain law enforcement activities, including search and rescue operations and civil and criminal investigations within Grand Canyon National Park, are also provided by Coconino County, a political subdivision of Arizona, through the county sheriff's office, pursuant to a Cooperative Agreement for Concurrent Criminal Jurisdiction at Grand Canyon National Park entered into between the County and the NPS.

The rafts and other equipment used by Moki Mac are leased from a Utah lessor. Moki Mac pays Utah workers' compensation payments and withholds Utah personal income taxes from employees' wages. Moki Mac does *not* pay sales, use or privilege taxes to Utah in connection with its river rafting trips.

Moki Mac does lease property within Arizona located outside of the national parks. This property consists of two acres at Badger Creek (a portion of which is used for parking vehicles), a storage building, a storage

shed, a permanent dwelling, and a temporary dwelling. Moki Mac's owners and employees live in the dwellings between trips, and leave personal property there for up to 6 months. The storage facilities are used to store river trip supplies. Moki Mac also uses its leased facilities in Arizona as a staging area for its river trips. Its employees pack food, load rafts and clean up after trips on Arizona property.

Moki Mac refers its customers to persons or companies who are able to transport them across Arizona highways to and from the rafting trip location and who, in some instances, shuttle their cars across Arizona highways. Finally, Moki Mac purchases some perishable supplies in Arizona for the trips, and advertises in Arizona by mailing information to Arizona residents.

The Department of Revenue is the agency that makes transaction privilege tax assessments and collections pursuant to A.R.S. §§ 42-1301, *et seq*. In 1983, the Department audited Moki Mac's books and records for the years 1980-82 and issued a deficiency assessment for transaction privilege taxes due because of the Department's belief that Moki Mac's activities within Arizona were taxable as a "business charging admission fees for . . . . amusement" pursuant to § 42-1309(A)(1). The deficiency assessment was based only on taxes calculated on the Colorado River trips in Arizona and not on any trips conducted in other states.[1]

The Department then appealed to the superior court. After cross-motions for summary judgment, the trial court granted summary judgment for Moki Mac and

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[1] The Department originally included a penalty in its assessment but subsequently rescinded the penalty, and now seeks payment only of the tax and interest accrued. It appears from the record that the parties disagree on the amount of interest accrued. The trial court did not adjudicate the correct amount of interest that would have accrued because it found the tax assessment to be invalid.

held the imposition of the tax invalid, concluding as a matter of law that "the activity engaged in by [Moki Mac] within the state of Arizona does not constitute engaging or continuing in business within this State."

2. *Issues and Standard of Review*

On appeal we must decide whether the trial court erred in concluding that Moki Mac's activity within the state does *not* constitute engaging in or continuing in business in this state. No material issue of fact appears in the record. The trial court's ruling was a conclusion of law, which does not bind an appellate court. *Tax Comm'n v. Howard P. Foley Co.*, 13 Ariz. App. 85, 87, 474 P.2d 444, 446 (1970). This court is free to substitute its analysis of the record for that of the lower court. *Tax Comm'n v. First Bank Bldg. Corp.*, 5 Ariz. App. 594, 596, 429 P.2d 481, 483 (1967).

If we agree with the trial court that Moki Mac was not engaged in or continuing in business in Arizona within the provisions of the transaction privilege tax statutes, then our inquiry is at an end and the trial court's ruling will be upheld. If we conclude to the contrary, we must then address the additional issues whether the Department's taxation of Moki Mac's activities violates the Commerce Clause of the United States Constitution, and whether such taxation is preempted by federal regulations. *Cf. Arizona Corp. Comm'n v. Media Products, Inc.*, ___ Ariz. ___, ___, 763 P.2d 527, 531 (App. 1988); *Peabody Coal Co. v. State*, ___ Ariz. ___, 761 P.2d 1094 (App. 1988).

A. *Was Moki Mac Engaging in Business in Arizona so as to Subject It to Liability for Transaction Privilege Taxes?*

The Arizona legislature has imposed a privilege tax upon persons engaging in certain businesses in the state. The privilege taxes are measured by the gross proceeds of sales or gross income arising from such business activities and are used, among other things, to liquidate the outstanding obligations of state and county governments and aid in defraying the necessary and ordinary expenses of these governments. A.R.S. § 42-1306. "Business" is defined by the legislature to include "all activities or acts, personal or corporate, engaged in or caused to be engaged in with the object of gain, benefit or advantage, either directly or indirectly, but not casual activities or sales." A.R.S. § 42-1301(1). Not only must the entity to be taxed be engaged in "business" within the state, but it also must be engaged in one of the specific types of business activities described in the statutes. The specific statutory provision under which the Department assessed taxes against Moki Mac is A.R.S. § 42-1309(A)(1), which imposes a transaction privilege tax upon the following:

> A. [E]very person engaging or continuing in this state in the following business classifications:
>
> 1. Operating or conducting theatres, movies, operas, shows of any type or nature, exhibitions, concerts, carnivals, circuses, amusement parks, menageries, fairs, races, contests, games, billiard and pool parlors, bowling alleys, public dances, dance halls, boxing and wrestling matches and any business charging admission fees for exhibition, amusement or instruction, other than projects of bona fide religious or educational institutions . . . .

In arguing that the trial court's ruling invalidating the tax should be upheld, Moki Mac contends not only that it was not engaged in a specific business covered by the statutes, but that its activities within the state could not be considered to be a "business" within the meaning of the transaction privilege tax statutes.

We first consider Moki Mac's contention that its business operations do not fall under § 42-1309(A)(1). Moki Mac claims that the Department is attempting to tax it for operating an amusement place and that the facts fail to show that the river trips may be so classified.

The Department points out that the statute allows taxation not only for "[o]perating or conducting . . . amusement parks" but also for "[o]perating or conducting . . . any business charging admission fees for . . . amusement." The Department does not contend that Moki Mac operates a place of amusement, but rather, contends that it operates a business that charges admission for amusement.

We agree with the Department that the statute applies to Moki Mac's river trips. That the river trips are an "amusement" and the cost of the trip is an "admission fee" for such amusement within the meaning of the statute cannot reasonably be disputed.

We next consider Moki Mac's argument that even if it is operating a business listed in § 42-1309(A)(1), it is not "engaged in business" within the state because none of the activities surrounding its taking reservations for rafting trips and receiving money for the reservations take place in Arizona. Moki Mac would have us hold that its providing rafting trips within Arizona cannot be considered to be its "business" and that only its administrative activities, particularly its taking money and issuing reservations, all of which occur in Utah, can be considered to be its "business." It cites a number of

Arizona cases in support of its contention.

First, Moki Mac quotes language from *Tax Comm'n v. Southwest Kenworth, Inc.*, 114 Ariz. 433, 438, 561 P.2d 757, 762 (App. 1977), a case in which the propriety of a transaction privilege tax was considered, which states that "the business activities which surround the sale must occur in Arizona before the assessment of the tax is permitted." Moki Mac argues that this language means that only the type of activities that would occur in a business office can be considered "business" and because none of these types of activities occurred in Arizona, Moki Mac was not "engaged in business" in Arizona.

We find that Moki Mac has taken this language out of context and has given it a meaning not intended by this court. In *Southwest Kenworth*, we were concerned with whether the taxpayer could be taxed under the portion of the transaction privilege tax statute taxing businesses engaged in selling tangible personal property at retail. The taxpayer maintained a large office in Arizona and most of its employees were located here. The actual sales in that case had occurred in Arizona. In upholding the tax, we held that in determining whether a transaction privilege tax for selling tangible personal property should be upheld, the actual sale need not take place in Arizona as long as business activities surrounding the sale took place here. Very simply, this language was not addressed to the issue whether "business" activities are limited to activities that would occur in a business office.

Moki Mac cites other Arizona cases in which the courts found that the taxpayer's business was not subject to Arizona's transaction privilege tax because the tax fell on interstate commerce. *See, e.g., Combustion Eng'g, Inc. v. Tax Comm'n*, 91 Ariz. 253, 371 P.2d 879 (1962); *Tax Comm'n v. Murray Co.*, 87 Ariz. 268, 3560 P.2d 674 (1960), *on remand*, 89 Ariz. 61, 358 P.2d 167 (1960). Neither of these cases is helpful to Moki Mac. Both involved

products that were sold in another state and were delivered to customers in Arizona. The fact that a company's delivery of a product in Arizona may not be sufficient activity to indicate a business presence within the state does not necessarily mean that rendering services within the state, which requires a much more prolonged presence of the company in the state, can never be considered "business" conducted within the state.

Additionally, the determination made in the above-mentioned cases, that the State may not tax sales made in interstate commerce, was based on authority later overruled by the United States Supreme Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), a case that we will examine in more detail. Thus, these Arizona cases are no longer completely reliable.

More importantly, Moki Mac's arguments completely ignore the definitional language of § 42-1301(1) that "business" includes "all activities or acts, personal or corporate, engaged in or caused to be engaged in with the object of gain, benefit or advantage, either directly or indirectly, but not casual activities or sales." We find this statutory definition broad enough to cover Moki Mac's river trips in Arizona. Certainly, the activities taking place in Moki Mac's Salt Lake City office, including making reservations and receiving payments, are part of its "business." However, providing river trips is the very essence of Moki Mac's particular business endeavors. The trips are the activities that Moki Mac engages in with the object of gain, benefit or advantage.

The Arizona courts have recognized that "selling" is not the only activity that constitutes "business." As the supreme court observed about the used car business in *Commercial Standard Ins. Co. v. West*, 74 Ariz. 359, 362, 249 P.2d 830, 832 (1952):

> A person who engages in the used car business, as in any business, must concern himself not alone with selling, but with all the myriad details required to conduct such a business. That each part of the business contributes to the total success or failure is patent.

In considering Arizona's statutory definition of "business," we have recognized that it is not limited to types of activities that would surround a sale or that would take place in a business office. In *Miami Copper Co. v. Tax Comm'n*, 121 Ariz. 150, 153, 589 P.2d 24, 27 (App. 1978), we stated that the taxpayer's business included both mining and smelting. Depending on the nature of the company, "business" may include a variety of activities in addition to selling a product or service.

We conclude that Moki Mac, by conducting river trips within the geographic boundaries of Arizona, was engaged in business within the state. The trial court erred in ruling that Moki Mac was not so engaged. Having reached this conclusion, we now examine the constitutional questions raised in this case that were presented to the trial court but were not addressed.

B. *Does State Taxation of Moki Mac Violate the Commerce Clause?*

The Department concedes that Moki Mac's Arizona river trips constitute interstate commerce. However, as the Department points out, the blanket prohibition against state taxation of the "privilege" of engaging in commerce that is interstate, established in cases such as *Spector Motor Serv., Inc. v. O'Connor*, 340 U.S. 602, 71 S.Ct. 508, 905 L.Ed 573 (1951), was overturned by the United States Supreme Court in *Complete Auto*. In

*Complete Auto*, the Court enumerated a 4-part test to determine whether a tax is prohibited by the Commerce Clause. Under that test, a state tax does not offend the Commerce Clause if it (1) is applied to an activity that has a substantial nexus with the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the state. 430 U.S. at 279. *See also Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 156, 102 S.Ct. 894, 911, 71 L.Ed.2d 21, 41 (1982); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 617, 101 S.Ct. 2946, 2953, 69 L.Ed.2d 884, 894 (1981).

Moki Mac does not contend that Arizona's transaction privilege tax as applied to it discriminates against interstate commerce. The Department avows that Arizona taxes in-state and out-of-state river rafting companies at the same rate, a fact that Moki Mac does not dispute.

Moki Mac does contend, however, that the three other requirements are not satisfied. We will consider each of these requirements to determine whether we can say as a matter of law that it was or was not satisfied.

Moki Mac argues that its activities within Arizona are insufficient to establish the necessary constitutional nexus to justify imposition of the transaction privilege tax. This argument is the same as Moki Mac's argument that it is not engaged in "business" in Arizona within the meaning of § 42-1301(1). The argument fails for the same reason: Moki Mac's business activities within the state are real and substantial.

We find the facts of this case to be clearly distinguishable from *City of Phoenix v. West Publishing Co.*, 148 Ariz. 31, 712 P.2d 944 (App. 1985), in which this court found that West's activities within Phoenix were insufficient to justify the City's imposition of a privilege license tax on business activities within its city limits.

West's only contact with the city was its employment of one individual who lived in Phoenix and conducted business out of his home. The home was the employee's own home and was not owned or leased by West. West maintained no offices, other facilities, or inventories in the state. None of West's publishing activities or sales activities took place in Arizona. The employee's only functions were to answer questions about West's products and to solicit sales by putting buyers in contact with West's office in Minnesota where the sale would be effected.

In contrast to what occurred in *West Publishing*, Moki Mac conducts its main money-making activity, the river trips, in Arizona. The facts presented in this case indicate that Moki Mac's employees stay in Arizona for as much as 6 months out of the year while providing river trips. Between trips the employees live in Arizona dwellings leased by Moki Mac. Not only does Moki Mac house its employees in Arizona, but it also maintains facilities in Arizona where it stores trip equipment. From these facts we conclude that Moki Mac has established a sufficient nexus with Arizona to allow the State to tax its Arizona operations.

Next, Moki Mac argues that Arizona's tax is not fairly related to the services provided by the State. It argues that the only services it receives from Arizona are law enforcement services from the Coconino County Sheriff's Office pursuant to its cooperative agreement with the National Park Service. Moki Mac argues that these services should not be considered because they are the National Park Service's obligation and are merely voluntarily shared by Coconino County.

We disagree with Moki Mac's characterization of the cooperative agreement as one in which Coconino County voluntarily accepts obligations belonging to the NPS. The agreement on its face recognizes that the

Coconino County Sheriff's Office and the NPS have concurrent criminal jurisdiction within the park. The agreement recites that both parties, having jurisdiction to enforce laws within the park, "desire to cooperate in law enforcement within the boundaries of the park and agree that such cooperation will result in a reduction in response time, cost to the public, and will promote the public welfare and enjoyment of the area by establishing a consistent and uniform application of enforcement." This agreement makes clear that Arizona, through its political subdivision Coconino County, does in fact have obligations to persons who are within the park and that it renders services to such persons in fulfillment of these obligations.

Moreover, Moki Mac totally ignores other services rendered to its employees and customers by the State that aid it in delivering the river trips. The State maintains the highways over which Moki Mac's employees and customers must travel to and from the trip sites. Moki Mac enjoys police protection for its leased property and for its employees who seasonally reside in its leased dwellings. No doubt Moki Mac receives numerous other services while its employees and customers are within the state, particularly in connection with its leased property, benefits which afford the "enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes." *Commonwealth Edison,* 453 U.S. at 623, quoting *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 521-23, 57 S.Ct. 868, 878-79, 81 L.Ed 1245 (1937).

We are satisfied that Moki Mac receives sufficient benefits from the State to justify imposition of the transaction privilege tax. The State is not required to show a dollar-for-dollar return of tax money in the form of benefits. *See Thomas v. Gay,* 169 U.S. 264, 18 S.Ct. 340, 42 L.Ed 740 (1898); *Peabody Coal,* 761 P.2d at 1098.

Moki Mac also alleges that the tax is not fairly apportioned. Moki Mac does not dispute that the Department seeks to impose its tax solely on the Arizona river trips and is not seeking to tax river trips occurring in other states. It argues, though, that Utah has a provision in its tax code under which the Utah taxing authorities may seek to assess a tax for Moki Mac's sale of river trips including the trips taken in Arizona. It argues that the Arizona tax should not be allowed because of what it terms "a real and distinct possibility" that it will be subjected to multiple taxation that would have a direct effect on interstate commerce.

The flaw in Moki Mac's argument is obvious. It has not shown that multiple taxation exists, only the possibility that it might exist in the future. The United States Supreme Court has said on the issue of multiple taxation of interstate commerce that it will not deal in abstractions and must be shown that a multiple burden actually exists. *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 463, 79 S.Ct. 357, 365, 3 L.Ed.2d 421, 430 (1959). The Court has also recognized that errors of apportionment that may lead to multiple burdens may be corrected when they occur. *Washington Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 647, 98 S.Ct. 1388, 1397, 55 L.Ed.2d 682, 694 (1978).

Because the sales activity for the Arizona river trips occurs in Utah, it may well be that Utah at some time will seek to tax Moki Mac's business activities, including its sale of river trips conducted in Arizona. Should this happen, Arizona will not lose its right to tax Moki Mac for engaging in business in Arizona, but the two states will have to fairly apportion the tax on Moki Mac's business activities. No apportionment is required now because multiple taxation has not been shown to exist.

Having concluded that no fact issue is presented to

call into question whether Arizona's taxation of Moki Mac's Arizona river trips offends the Commerce Clause, we proceed to Moki Mac's final argument that state taxation is preempted by federal regulation.

### C. *Is State Taxation of River Rafting Trips Within the Grand Canyon Preempted by Federal Regulation?*

Moki Mac argues that the federal government has so pervasively regulated activities taking place within Grand Canyon National Park that the State may not impose a tax on activities taking place there. In support of this contention, Moki Mac points out that the Park was established by federal statute, 16 U.S.C. §§ 221, *et seq*. Moki Mac cites § 222 as reserving to the federal government the regulation of concessionaires operating within the Park. We note that the relevant portions of § 222 provide merely that the administration, protection, and promotion of the Park "shall be exercised, under the direction of the Secretary of the Interior, by the National Park Service," and that all concessions and privileges "for the accommodation or entertainment of visitors shall be let at public bidding."

A state may not impose its laws in an area that is so tightly regulated by the federal government that no room exists for taxation or regulation by the states. *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965); *see also Department of Revenue v. Hane Constr. Co.*, 115 Ariz. 243, 245, 564 P.2d 932, 934 (App. 1977). It is equally well settled that "[p]re-emption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons--either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.'" *Chicago & N.W. Transp.*

*Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317, 101 S.Ct. 1124, 1130, 67 L.Ed.2d 258, 264-65 (1981), quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248, 257 (1963).

We do not find from the statutes cited any intent by Congress to preempt Arizona's taxation of Moki Mac's river trips conducted within the Park. Congress has expressly permitted states to levy sales or use taxes on activities occurring in a federal area situated within a state. 4 U.S.C. § 105(a). Moki Mac has not pointed to anything specific in the federal statutes that would conflict with Arizona's imposing a transaction privilege tax on Moki Mac's river trips.

In exacting its tax, Arizona does not interfere with the federal government's authority to permit Moki Mac to conduct its activities within the Park. The propriety of a transaction privilege tax does not depend on whether the state can lawfully permit or prohibit a business from operating on federal land, but rather upon whether the business by its operation within the geographical boundaries of the state is the beneficiary of services rendered by the state. *Cf. Peabody Coal*, 761 P.2d at 1097. We are not persuaded that federal regulation of the Park preempts the State from imposing its transaction privilege tax in this instance.

### 3. *Conclusion*

We hold that Moki Mac's river trips conducted in Arizona on the Colorado River constitute "engaging in business" in this state and fall within the purview of A.R.S. § 42-1309(A)(1). Further, taxation of these river trips conforms to constitutional constraints. We reverse the judgment of the trial court and remand for determination of the amount of interest accrued and for entry of judgment against Moki Mac for the tax deficiency,

including accrued interest.

/s/ _____
Robert J. Corcoran, Judge

CONCURRING:

/s/ _____
D. L. Greer, Judge

/s/ _____
Sarah D. Grant, Judge

NOTE: The Honorable Robert J. Corcoran, Justice of the Arizona Supreme Court, has been authorized by Administrative Order No. 89-3 of the Chief Justice, to participate in the resolution of this case which was previously assigned to him as a judge of this Court or to his department before Thursday, January 5, 1989.

IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

| | |
|---|---|
| DEPARTMENT OF REVENUE, | ) |
| | ) |
| Plaintiff-Appellant, | ) |
| | ) |
| v. | ) |
| | ) |
| MOKI MAC RIVER EXPEDITIONS, INC. | ) |
| | ) |
| Defendant-Appellee. | ) |
| | ) |

ORDER

The above-entitled matter was duly submitted to the court. The court has this day rendered its opinion.

IT IS ORDERED that the opinion be filed by the Clerk.

IT IS FURTHER ORDERED that a copy of this order, together with a copy of the opinion, be sent to each party appearing herein or the attorney for such party and to the Honorable Bernard J. Dougherty, Judge.

DATED this 24th day of January, 1989.

/s/ _____
Robert J. Corcoran, Judge

# APPENDIX B

SUPERIOR COURT OF THE STATE OF ARIZONA
MARICOPA COUNTY

| | | |
|---|---|---|
| STATE OF ARIZONA, ex rel., ARIZONA DEPARTMENT | ) | No. C-577828 |
| Plaintiff, | ) | JUDGMENT |
| vs. | ) | |
| MOKI MAC RIVER EXPEDITIONS, INC., | ) | |
| Defendant. | ) | |

This matter having come to the Court on cross-motions for summary judgment; the parties having appeared, by counsel, and the Court having heard argument and after consideration of the motions, responses and replies thereto and authorities cited therein;

The Court finding that based upon the undisputed facts presented that Defendant Moki Mac River Expeditions, Inc. is not "engaged in or continuing in" business within this State so as to authorize the amusement tax sought to be imposed as that phrase is used in A.R.S. §§ 42-1301 and 42-1309.

The Court finds based thereon that as a matter of law, the activity engaged in by Defendant within the State of arizona does not constitute engaging or continuing in business within this State and that, therefore, the proposed tax is invalid as to this Defendant;

NOW IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the complaint of Plaintiff, Arizona Department of Revenue, is hereby dismissed, with prejudice as against Defendant Moki Mac River Expeditions, Inc., and that Defendant Moki Mac River

Expeditions is entitled to its statutory costs in accordance with A.R.S. § 13-341 in the amount of $30.00 and attorneys' fees in accordance with its request and A.R.S. § 12-348(A)(1) and (3) and that a reasonable attorneys' fee to be awarded therein is $6,682.50; and that Defendant shall have and recover against the State of Arizona such costs and attorneys' fees.

DONE IN PHOENIX, ARIZONA this 5 day of October, 1987.

/s/
Hon. Bernard J. Dougherty
Judge of the Superior Court

# APPENDIX C

ARIZONA STATE
BOARD OF TAX APPEALS

| | | |
|---|---|---|
| MOKI MAC RIVER EXPEDITIONS, INC. | ) | |
| | ) | Docket No. |
| Appellant, | ) | 373-85-S |
| | ) | |
| vs. | ) | NOTICE OF DECISION; |
| | ) | FINDINGS OF FACT |
| ARIZONA DEPARTMENT OF REVENUE, | ) | AND CONCLUSIONS OF LAW |
| | ) | |
| Appellee. | ) | |
| | ) | |

This matter having been presented for hearing, and the Board having considered all evidence and arguments presented and having taken the matter under advisement:

The Board finds and concludes as follows:

## FINDINGS OF FACT

The notice of appeal was timely filed and this Board has jurisdiction.

The Appellant, Moki Mac River Expeditions, Inc., is a Utah corporation engaging in the business of conducting river tours and white water rafting adventures for clients from throughout the United States and the world. It has an office and principal place of business in Salt Lake City, Utah. All the financial arrangements, which include the billing and payments received, for the bookings of reservations are done through its office in Salt Lake City.

Appellant's river expeditions take place principally on rivers in Utah, Colorado and Arizona. The activities upon which the Arizona Department of Revenue

("Department") seeks to tax are the Colorado River excursions through the Grand Canyon National Recreation Area and continue down the river and canyon to either Phantom Ranch or Diamond Creek.

At no time during these excursions does Appellant exit a National Park or recreation area. Since the expeditions take place within federal enclaves, the Appellant is subject to federal regulations and is charged a fee by the National Park Service.

Appellant maintains no office, employees, plants, solicitors, warehouses, dealers or representatives of any kind in Arizona. All applicable income, employment and other taxes are paid by Appellant in accordance with Utah laws.

The Sales and Use Tax Section ("Section") of the Department issued a transaction privilege tax deficiency assessment in the amount of $41,631.86, including a fraud penalty and interest for the years 1980 through 1982. The Section treated the gross receipts of Appellant as unreported taxable amusement income pursuant to A.R.S. § 42-1314(A)(1).

A.R.S. § 42-1314(A)(1) authorizes the assessment of a tax "upon every person engaging or continuing in this state . . . any business charging admission fees for . . . amusement." The Appellant's main contention was that there was not sufficient nexus between the State of Arizona and Appellant's activities to support the imposition of the tax. The only contact that Appellant has with Arizona is that passengers are picked up at Lee's Ferry.

The Appellee contends:

(1) That the fact that the entire expedition originates and terminates within federal enclaves is not a bar to the state's taxing powers.

(2) There is sufficient nexus with Arizona so that a tax may be levied.

(3) The Appellant received benefits from the State of Arizona such as law enforcement and the use of highways.

## CONCLUSIONS OF LAW

Appellant did not have sufficient business contact with the State of Arizona for the imposition of the transaction privilege tax pursuant to A.R.S. § 42-1314(A)(1).

## ORDER

THEREFORE, IT IS HEREBY ORDERED that Appellant's appeal is upheld and that the Arizona Department of Revenue abate the transaction privilege tax deficiency assessment issued against the Appellant, in the amount of $41,631.86, including the fraud penalty and interest, for the years 1980 through 1982.

This decision becomes final upon the expiration of thirty (30) days from receipt, unless either the state or the taxpayer brings an action in superior court as provided in A.R.S. § 42-1338.01. A rehearing or review of the decision may be granted on motion filed by the aggrieved party within fifteen (15) days from receipt of such order or decision as provided in the Board's regulation R16-3-121.

DATED this 2nd day of April, 1986.

STATE BOARD OF TAX APPEALS

/s/
Edward D. Richardson, Chairman
Division Two

# APPENDIX D

BEFORE THE
ARIZONA DEPARTMENT OF REVENUE

| | |
|---|---|
| In the Matter of | ) |
| | ) PROPOSED DECISION |
| MOKI MAC RIVER | ) OF |
| EXPEDITIONS, INC. | ) HEARING OFFICER |
| INC. | ) |
| | ) CASE NO. 84325-S |
| License No. 07-278361-M | ) |
| | ) |

This taxation dispute is between Moki Mac River Expeditions, Inc., (Taxpayer) and the Sales and Use Tax Section (Section) of the Arizona Department of Revenue (Department). At issue is whether Taxpayer's business activities were taxable pursuant to A.R.S. § 12-1314(A)(1).

## FINDINGS OF FACT

Taxpayer is a Utah Corporation doing business in Salt Lake City, Utah, by providing river rafting services to customers from all over the United States. Taxpayer's entire business activity consists of transporting, for hire, people down the Colorado River to points down river within the confines of the Grand Canyon National Park.

Taxpayer has no offices, agents, employees, solicitors, or facilities in Arizona. All of the financial arrangements for the booking of these various expeditions are taken care of through Taxpayer's office in Salt Lake City, and no money changes hands in Arizona. Taxpayer's sole contact with Arizona is to meet its clients at Lee's Ferry, within the boundaries of the Glen Canyon National Recreation Area, from which the clients are then transported down the Colorado River. The rafting expeditions take place within federal enclaves and Taxpayer, subject to federal regulation, is charged a fee by the National Park Service.

The Section has treated the gross receipts of

Taxpayer as unreported taxable amusement income pursuant to A.R.S. § 12-1314(A)(1). Taxpayer has raised several arguments in support of its position that no tax is due and, for purposes of this decision, the primary position is that Arizona does not have sufficient business contact with Taxpayer to justify imposition of the transaction privilege tax.

According to Taxpayer's protest, the amount of tax, interest, and penalty under consideration is approximately $42,000.00.

## CONCLUSIONS OF LAW

The Section has referred to a decision of the State Board of Tax Appeals, *Canyon Tours, Inc. v. Arizona Department of Revenue*, Docket No. 212-81-S (filed July 19, 1982), as support for its position. That case involved scenic boat rides on Lake Powell within the state boundaries of both Utah and Arizona. That decision determined that Canyon Tours' business activity of providing sightseeing tours was an "amusement" within the meaning of A.R.S. § 42-1314(A)(1). By analogy, river rafting expeditions would also appear to fall within the amusement category.

However, just because Taxpayer's and Canyon Tours' business activities might both constitute "amusement" as that term is used in § 42-1314(A)(1), does not automatically mean that Taxpayer's activities are taxable. There must be a sufficient nexus between the taxing state and Taxpayer's activities to support imposition of the tax. This was recognized by the Board in the above-mentioned case where the following observations were made:

> All three of the tours that a tax has been assessed against begin and end in Arizona;

> business offices are located in Arizona; tour boats are stored and located in Arizona; Appellant is licensed by the Arizona Corporation Commission as a passenger carrier; and that admission tickets to the tours are sold in Arizona. Findings of Fact No. 7, p .2.

As has been previously stated, the only contact that Taxpayer has with Arizona is that passengers are picked up here; none of the other factors mentioned by the Board to show nexus are applicable in this case.

This rationale was also employed in *Arizona State Tax Commission v. Southwest Kenworth, Inc.*, 114 Ariz. 433, 438, 561 P.2d 757, 762 (App. 1977), where the court stated that "the business activities which surround the sale must occur in Arizona before the assessment of the tax is permitted." In that case, the court listed those activities as follows:

> As noted, Kenworth is an Arizona corporation with the majority of its employees located in Arizona. It maintains a parts and service division in Phoenix for the purpose of servicing equipment sold to customers after the expiration of the manufacturer's warranty. The company president testified that this parts and service constituted a vital part of Kenworth's business, and that parts representatives made regular visits to the mines. Additionally, during the pertinent time period, Kenworth's off-highway sales manager also regularly visited the mines to maintain a good relationship and to determine possible needs.

> Regarding the specifics of the sales to Kennecott and ASARCO, the specifications for the equipment were worked out with mine personnel in Arizona, the vehicles were custom-made for use in each particular Arizona mine, purchase orders were accepted at the Phoenix office and invoicing and payment went through the Phoenix office of Kenworth. In addition, final inspection and acceptance occurred at the mine sites.

112 Ariz. at 439.

With Taxpayer's only contact with Arizona being the pick-up of passengers at Lee's Ferry, there does not appear to be sufficient business activity surrounding Taxpayer's sales in Arizona to permit the tax. Therefore,

IT IS ORDERED granting Taxpayer's protest.

DATED THIS 22nd day of March, 1985.

ARIZONA DEPARTMENT OF REVENUE
APPEALS SECTION

/s/
Gale L. Garriott
Hearing Officer

# APPENDIX E

SELECTED PROVISIONS FROM TITLE 42,
ARIZONA REVISED STATUTES

**§ 42-1302. Exclusions from gross income, receipts or proceeds**

A. For the purpose of this article the total amount of gross income, gross receipts or gross proceeds of sales shall be deemed to be the amount received, exclusive of:

1. The taxes imposed by this chapter and sales or transaction privilege taxes imposed by municipalities in this state. In no event shall the person upon whom the tax is imposed, when an added charge is made to cover the tax levied by this article, remit less than the amount so collected to the department.

2. Freight costs billed to and collected from a purchaser by a retailer for tangible personal property which, upon the order of the retailer, is shipped directly from a manufacturer or wholesaler to the purchaser.

B. For the purposes of this article the total amount of gross income, gross receipts or gross proceeds of sales for nuclear fuel shall be deemed to be the value of the purchase price of uranium oxide used in producing the fuel. The tax imposed by this article will be imposed only once for any one quantity or batch of nuclear fuel regardless of the number of transactions or financing arrangements which may occur with respect to that nuclear fuel.

**§ 42-1306. Levy of tax, purposes; distribution**

A. There is levied and there shall be collected by the department, for the purpose of raising public money to be used in liquidating the outstanding obligations of the state and county governments, to aid in

defraying the necessary and ordinary expenses of the state and the municipalities and counties in this state, to reduce or eliminate the annual tax levy on property for state, municipal and county purposes and to reduce the levy on property for public school education, privilege taxes measured by the amount or volume of business transacted by persons on account of their business activities, and in the amounts to be determined by the application of rates against values, gross proceeds of sales or gross income, as the case may be, as prescribed by this article.

B. If any funds remain after the payments are made for state purposes, as provided for by subsection A, the remainder of the funds shall be paid into the state school fund for educational purposes.

C. The tax levied by and collected pursuant to this article is designated the "transaction privilege tax".

**§ 42-1307. Transportation; communications; utilities; private car lines; pipelines; publishing; printing; owner-builder**

A. The tax imposed by this article is levied and shall be collected at the rate of five per cent of the gross proceeds of sale or gross income from the business of every person engaging or continuing in this state in the following business classifications:

1. Transporting for hire persons, freight or property by motor vehicle, railroads or aircraft from one point to another in this state. The tax prescribed by this section does not apply to:

(a) Ambulances or ambulance services provided under title 48 or certified pursuant to title 36,

chapter 21.1[1] or provided by a city or town in a county with a population of less than one hundred fifty thousand as determined in the most recent United States decennial census.

(b) Public transportation program services for the dial-a-ride programs and special needs transportation services.

2. Producing and furnishing or furnishing to consumers electricity, natural or artificial gas and water. Sales of electricity, gas or water to a person for resale are exempt from the tax under this section. Gross proceeds of sales or gross income subject to the tax under this paragraph does not include:

(a) Revenues received by a municipally owned utility in the form of fees charged to persons constructing residential, commercial or industrial developments or connecting residential, commercial or industrial developments to a municipal utility system or systems if the fees are segregated and used only for capital expansion, system enlargement or debt service of the utility system or systems.

(b) Revenues received by any person or persons owning a utility system in the form of reimbursement or contribution compensation for property and equipment installed to provide utility access to, on or across the land of an actual utility consumer if the property and equipment become the property of the utility. This exclusion shall not exceed the value of such property and equipment.

3. Intrastate telecommunications services, including gross income derived from tolls, subscriptions and services on behalf of subscribers, or from the publication of a directory of the names of subscribers, but excluding gross income derived from sales of intrastate

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[1] Section 36-2201 et seq.

telecommunications services which will be used by other persons in the business of providing intrastate telecommunications services who are taxed under paragraph 4 of this subsection.

4. Providing intrastate telecommunications services to final users by persons other than those engaged in the business of providing intrastate telecommunications services who are taxed under paragraph 3 of this subsection.

5. Operating pipelines for transporting oil or natural or artificial gas through pipes or conduits from one point to another in this state.

6. Operating private car lines, as defined in chapter 4, article 3 of this title,[2] from one point to another point in this state.

7. Publication of newspapers, magazines or other periodicals and publications if published in this state, including the gross income derived from subscriptions and notices but excluding gross income derived from advertising and manufacturing or publishing books. Subscription income subject to taxation under this section includes all circulation revenue, except amounts actually retained by or credited to carriers and other vendors as compensation for sale or delivery of publications and revenue from publications sold, directly or through wholesalers or jobbers, to retailers for resale.

8. Job printing, engraving, embossing and copying sold to purchasers in this state. The sale of job printing, engraving, embossing or copying is exempt from the tax under this section if sold to:

(a) A person in this state who has a transaction privilege tax license issued in this state and does one of the following:

(i) Resells the job printing, engraving,

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[2] Section 4-301 et seq.

embossing or copying.

(ii) Distributes such printing, engraving, embossing or copying without consideration in connection with the publication of a newspaper or magazine.

(b) A person who directly or indirectly includes the proceeds from job printing in gross receipts which are taxable under paragraph 7 of this subsection.

(c) Nonresidents of this state for use outside this state if the vendor ships or delivers the job printing, engraving, embossing or copying out of this state.

9. Operating as an owner-builder. The purchase of tangible personal property for incorporation into any realty improvement, building, highway, road, railroad, excavation or other structure, project, development or improvement is subject to the tax computed on the sales price thereof, but the purchase of tangible personal property which sale has already been subjected to the tax imposed under § 42-1315 is exempt from the tax. An owner-builder who sells such real property as improved at any time on or before the expiration of twenty-four months after the improvement is substantially completed, meaning suitable for the use or occupancy intended, shall be treated as a prime contractor for the purpose of taxing the sale of those improvements incorporated within that twenty-four month period.

B. Twenty per cent of the tax revenues collected from the business classifications in this section is designated as distribution base for purposes of § 42-1341.

**§ 42-1308. Prime contracting; dealership of manufactured buildings; exceptions**

A. The tax imposed by this article is levied and shall be collected at the rate of five per cent of the gross proceeds of sales or gross income from the business of

every person engaging or continuing in this state in the businesses of prime contracting and dealership of manufactured buildings.

B. In connection with prime contracting and dealership of manufactured buildings, the following are not subject to tax under this article:

1. The sales price of land, which shall not exceed the fair market value.

2. An amount equal to thirty-five per cent of gross income or grass proceeds of sales, not including the sales price of land not subject to tax under paragraph 1 of this subsection,m in lieu of any labor employed in manufacturing, construction, improvements or repairs.

3. Sales and installation of groundwater measuring devices required under § 45-604.

4. The sale of a used manufactured building by a dealership or others.

5. Furniture, furnishings, fixtures, appliances and attachments not incorporated as component parts of manufactured buildings at the time of purchase by the dealership for resale. Such items are subject to the taxes imposed by this article separately and distinctly from the gross proceeds or gross income from the sale of the manufactured building.

6. Gross proceeds or gross income received under contracts entered into with the United States government or any of its agencies or authorized agents to construct, remodel, repair or alter a federal research project within the state of Arizona having an initial gross construction cost of more than two billion dollars.

C. Subcontractors or others who perform services in respect to any improvement, building, highway, road, railroad, excavation or other structure, project, development or improvement are not subject to tax if they can demonstrate that the job was within the control of a prime contractor or contractors or a dealership

of manufactured buildings and that the prime contractor or dealership is liable for the tax on the gross income, gross proceeds of sales or gross receipts attributable to the job and from which the subcontractors or others were paid.

D. Every person engaging or continuing in this state in the business of prime contracting or dealership of manufactured buildings shall present to the purchaser of such prime contracting or manufactured building a written receipt of the gross income or gross proceeds of sales from such activity and shall separately state the taxes to be paid pursuant to this section.

E. Twenty per cent of the tax revenues collected from the businesses classified in this section is designated as distribution base for purposes of § 42-1341.

**§ 42-1309. Operating amusement places; restaurants; exemptions**

A. The tax imposed by this article is levied and shall be collected at the rate of five per cent of the gross proceeds of sales or gross income from the business of every person engaging or continuing in this state in the following business classifications:

1. Operating or conducting theaters, movies, operas, shows of any type or nature, exhibitions, concerts, carnivals, circuses, amusement parks, menageries, fairs, races, contests, games, billiard and pool parlors, bowling alleys, public dances, dance halls, boxing and wrestling matches and any business charging admission fees for exhibition, amusement or instruction, other than projects of bona fide religious or educational institutions. The tax imposed by this section does not apply to:

(a) Events sponsored by the Arizona coliseum and exposition center board or county fair commissions.

(b) Gross income, no portion of which inures to the benefit of any private shareholder or individual, received by a musical, dramatic or dance group, or by a botanical garden, museum or zoo, qualified as a nonprofit charitable organization under § 501(c)(3) of the United States Internal Revenue Code, as defined in § 43-104.

2. Restaurants, dining cars, dining rooms, lunchrooms, lunchstands, soda fountains or similar establishments where articles of food or drink are sold for consumption on or off the premises. The tax imposed by this section does not apply to sales:

(a) By a congressionally chartered veterans organization of food or drink prepared for consumption on the premises leased, owned or maintained by the organization.

(b) For the purpose of fund raising by churches, fraternal benefit societies and other nonprofit organizations, as these organizations are defined in the federal Internal Revenue Code, 26 United States Code § 501, which do not regularly engage or continue in the restaurant business.

B. Forty per cent of the tax revenues collected from the businesses classified in this section is designated as distribution base for purposes of § 42-1341.

**§ 42-1310.12. Personal property rental classification; definition**

A. The personal property rental classification is comprised of the business of leasing or renting tangible personal property for a consideration. The personal property rental classification does not include:

1. Professional or personal service occupations or businesses which involve leases or rentals of tangible personal property only as inconsequential elements.

2. Leasing or renting films, tapes or slides used by theaters or movies, which are engaged in business under the amusement classification, or used by television stations or radio stations.

3. Activities engaged in by the Arizona coliseum and exposition center board or county fair commissions in connection with events sponsored by such entities.

4. Leasing or renting tangible personal property by a parent corporation to a subsidiary corporation or by a subsidiary corporation to another subsidiary of the same parent corporation if taxes were paid under this chapter on the gross proceeds or gross income accruing from the initial sale of the tangible personal property. For purposes of this paragraph, "subsidiary" means a corporation of which at least eighty per cent of the voting shares are owned by the parent corporation.

5. Operating coin operated washing, drying and dry cleaning machines or coin operated car washing machines at establishments for the use of such machines.

B. The tax base for the personal property rental classification is the gross proceeds of sales or gross income derived from the business, but the gross proceeds of sales or gross income derived from the following shall be deducted from the tax base:

1. Reimbursements by the lessee to the lessor of a motor vehicle for payments by the lessor of the applicable fees and taxes imposed by §§ 28-205, 28-206 and 28-1591 and article IX, § 11, Constitution of Arizona, to the extent such amounts are separately identified as such fees and taxes and are billed to the lessee.

2. Leases or rentals of tangible personal property if, had such property been sold by a person engaged in a business classified under the retail classification, the gross proceeds of sales or gross income

would be deducted from the tax base for the retail classification.

C. Sales of tangible personal property to be leased or rented to a person engaged in a business classified under the personal property rental classification are deemed to be resale sales.

D. For purposes of this section "tangible personal property" means personal property which may be seen, weighed, measured, felt or touched or is in any other manner perceptible to the senses.

**§ 42-1310.14 Amusement classification**

A. The amusement classification is comprised of the business of operating or conducting theaters, movies, operas, shows of any type or nature, exhibitions, concerts, carnivals, circuses, amusement parks, menageries, fairs, races, contests, games, billiard or pool parlors, bowling alleys, public dances, dance halls, skating rinks, tennis courts, video games, pinball machines, sports events or any other business charging admission or user fees for exhibition, amusement, entertainment or instruction, other than activities or projects of bona fide religious or educational institutions. The amusement classification does not include the operation or sponsorship of events by the Arizona coliseum and exposition center board or county fair commissions.

B. The tax base for the amusement classification is the gross proceeds of sales or gross income derived from the business.

**§ 42-1313 Mining, oil and gas**

A. The tax imposed by this article is levied and

shall be collected at the rate of three and one-eighth per cent of the gross proceeds of sales or gross income from the business of every person engaging or continuing in this state in the business of mining, quarrying or producing for sale, profit or commercial use any oil, natural gas, limestone, sand, gravel or nonmetalliferous mineral product, compound or combination of nonmetalliferous mineral products.

B. The rate shall be applied to the value of the entire product mined, quarried or produced for sale, profit or commercial use in this state, regardless of the place of sale of the product or of the fact that deliveries may be made to points without this state.

C. In the case of persons engaged in the businesses classified in this section whose incomes, wholly or in part, are derived from service or manufacturing charges instead of from sales of the products manufactured or handled, the rate shall be applied to the gross income of such persons derived from the service or manufacturing charge.

D. If any person engaging in any business classified in this section ships or transports products, or any part thereof, out of this state without making sale of the products or ships his products outside of this state in an unfinished condition, the value of the products or articles in the condition or form in which they existed when transported out of this state and before they enter interstate commerce is the basis for assessment of the tax imposed by this section and the department shall prescribe equitable and uniform rules for ascertaining that value. In determining the basis of assessment, if the product or any pert of the product has been processed in this state and a tax paid by the processor or otherwise pursuant to this chapter on the proceeds of such processing, the person may deduct from the value of the product when transported out of this state the cost of such processing.

E. Thirty-two per cent of the tax revenues collected from the businesses classified in this section is designated as distribution base for purposes of § 42-1341.